(13)

No. 99-936

Supreme Court, U.S.
FILED
JUL 24 2000
CLERK

In the
Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF OF RESPONDENTS

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47 pp

QUESTION PRESENTED FOR REVIEW

Whether the urine drug tests performed by the MUSC Medical Center for medical purposes in the course of treatment of their maternity patients were reasonable searches under the Fourth Amendment?

I. Whether the urine drug tests were reasonable under the special needs doctrine?

II. Whether the urine drug tests were consensual?

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STATEMENT OF THE CASE

I. Introduction

This case presents a Fourth Amendment challenge to urine drug screens performed on pregnant patients by the medical staff of the Medical University of South Carolina ["MUSC Medical Center"] pursuant to its policy for "Management of Drug Abuse During Pregnancy," ["the Policy"].

The Petitioners are ten women who sought treatment at the MUSC Medical Center during their pregnancies. As part of their medical treatment, they voluntarily provided urine samples for testing. Because these patients exhibited certain medical symptoms and criteria delineated in the Policy as indicative of cocaine use, their urine samples were tested for cocaine as well as other routine readings. When the tests established that these women had, in fact, been using cocaine during their pregnancies, the MUSC Medical Center referred each patient to substance abuse counseling due to the potential catastrophic medical complications to the fetus associated with maternal cocaine use. And, as required by state law, MUSC also reported the positive test results to law enforcement. Nine of the ten Petitioners were arrested, but none were prosecuted to trial. Rather, each of the women completed substance abuse treatment and the charges were dismissed.

In this Section 1983 claim, the Petitioners allege that the urine tests performed for medical purposes were warrantless searches which violated their Fourth Amendment rights. However, their claims have been rejected at the trial and appellate levels.

At trial, the jury found that the Petitioners consented to the tests. On appeal, the court held that the searches were reasonable under the special needs doctrine as enunciated by this Court, without reaching the question of the sufficiency of the evidence to support the jury's factual finding of consent. 186 F.3d 469 (4th Cir. 1999).

The law and the evidence fully support the findings of both the jury and the Court of Appeals that the urine drug screens were reasonable and thus not violative of the Fourth Amendment. Accordingly, judgment for the Respondents should be affirmed.

First, the Court of Appeals correctly found no Fourth Amendment violation under the special needs analysis based on evidence that the drug screen effectively met special needs beyond normal law enforcement goals and only minimally intruded on the Petitioners' privacy rights. More specifically, the medical expert testimony establishes that the urine drug screens were medically necessary for management of pregnant patients and their newborns. In addition, the documented evidence establishes a broader special need, namely -- an epidemic of cocaine use among its maternity patient base and the serious consequent public health problems and associated fiscal costs.

The clinical necessity for the drug screens, the health problems associated with maternal cocaine use, and the astronomical economic costs of caring for infants suffering from the effects of cocaine use by their mothers all created special needs beyond normal law enforcement goals. On the other hand, the urine testing policy was a minor intrusion on the Petitioners' privacy expectations inasmuch as their urine

was collected and tested in the regular course of medical treatment to which they had consented.

In balancing these factors, the Court of Appeals properly concluded that the MUSC Medical Center's special interest in protecting the health of its pregnant patients and their children significantly outweighed the minimal intrusion suffered by the Petitioners. In addition, the record contains sufficient evidence to sustain the jury's finding that the Petitioners consented to testing. Ultimately, under either analysis, the searches conducted were reasonable and did not violate the Fourth Amendment.

II. The Special Needs Beyond Normal Law Enforcement Goals

In this case, the MUSC Medical Center had not one, but two, special needs for identifying cocaine use among its maternity patients, both of which were beyond normal drug interdiction law enforcement goals. First and foremost, the medical staff had a direct clinical need to know if the women were using cocaine so that they could safely manage the pregnancy and provide necessary treatment. Beyond that clinical need, there was a broader medical and social need to stem the tide of an epidemic of maternal drug use with potentially devastating medical consequences and staggering social costs. Separately or collectively, these needs were important enough, if not absolutely compelling, to justify conducting drug tests on the urine samples voluntarily provided by the maternity patients.

A. The Clinical Need for Urine Drug Tests

The Respondents presented expert medical testimony that the use of cocaine can have serious consequences for both maternal and infant health. Effects on the mothers include: creased risk of premature delivery, premature separation of the placenta (abruptio placentae), spontaneous abortion, and death. [Opp. App.[1] 76] Cocaine use during pregnancy can affect infants in a number of ways, including an increased risk of sudden death syndrome, low birth weight, seizures, strokes, heart attacks, lack of bonding, emotional disorders, behavioral problems, and learning disabilities. [Opp. App. 75] Other medical problems suffered by these infants include: brain damage, prune belly syndrome, limb reduction defects, kidney damage, and damage to the genitourinary and reproductive systems. [J.A. 35-43; see also J.A. 303-312] In some cases, even a single dose of cocaine can kill the baby and the mother too. [J.A. 43]

The potential complications with the pregnancy and delivery make it clinically necessary for the obstetrical staff to know whether the mother has used cocaine. [J.A. 846, 847-48] The pediatric staff also need to know if a newborn has tested positive for drug use because their management of newborns can be affected by possible withdrawal or other manifestations of prenatal drug abuse. [J.A. 28-29, 847]

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[1] Transcript excerpts and exhibits can be found in three appendices filed with this Court – the Appendix ["App."] submitted by the Petitioners with their Petition for a Writ of Certiorari, the Appendix ["Opp. App."] submitted by the Respondents with their Brief in Opposition, and the Joint Appendix ["J.A."].

B. The Epidemic of Cocaine Use by Pregnant Women

In the late 1980s and early 1990s, research studies and medical literature were published documenting a national epidemic of prenatal illegal drug use and the staggering associated social and economic costs. [See J.A. 46, 488] One study indicated that each year in South Carolina, alone, approximately 15,000 babies suffered from prenatal exposure to illegal drugs. [Opp. App. 73] Of those, as many as 3,221 pregnant women, were using cocaine. [Opp. App. 74] In addition to the literature, the medical staff at the MUSC Medical Center began observing the local effect of that epidemic in their maternity patients. [J.A. 624-25, 847]

As noted above, the cocaine use by pregnant women seriously impacts the health of both mother and child. Prenatal cocaine use also produces staggering societal costs – increased need for neonatal intensive care at birth, increased needs for social services, foster care, and special education services, lower levels of achievement of educational and occupational goals, increased family stress, and reduced maternal bonding. [Opp. App. 76] The national costs to care for infants exposed to cocaine were estimated to rise as high as $3 billion annually. [J.A. 320] The medical costs for each infant can exceed $50,000 for the first year alone. Severe exposure can result in lifetime economic costs in excess of $ 1 million per infant. [Opp. App. 77]

III. Development of the Policy

A. The Initial Protocol

When the MUSC medical staff observed that the national epidemic had reached Charleston, they established a protocol in April 1989 to routinely evaluate their maternity patients

for possible cocaine use. Because of concerns about the degree of discretion in allowing individual physicians to order urine drug tests without any parameters, they established six criteria to control the discretion.

Any MUSC maternity patient presenting one or more of these criteria was automatically tested. If a patient tested positive, she was referred to the county substance abuse commission for counseling and treatment. However, this protocol proved to be ineffective when virtually none of the patients referred followed through with treatment. [J.A. 635-36, 641; Opp. App. 67]

B. The Search for an Effective Policy – The Multidisciplinary Task Force

Faced with a crisis and lack of success with the voluntary referral protocol, the Medical Center was still in need of an effective policy. During this time, Shirley Brown, the case manager for the obstetrics department learned that under state law, prenatal cocaine use constituted child abuse and neglect which the Medical Center was required to report to law enforcement. [J.A. 73]

Ms. Brown mentioned it to the Medical Center's General Counsel who in turn contacted the Charleston County Solicitor regarding the hospital's obligation under the state mandatory reporting statute. [J.A. 74, 337]

In an effort to address the complicated, multidimensional problem of maternal drug abuse, a multidisciplinary task force was formed in the fall of 1989, consisting of representatives from different agencies with varied interests in formulating a solution: [J.A. 338-39]

- The MUSC Medical Center obstetrical and neonatology staff had a vital interest in maternal and infant health;

- The Charleston County Solicitor's Office and the City of Charleston Police Department had an interest in protecting the infants and enforcing the laws governing illegal drug use and child abuse and neglect.[2]

- The Department of Social Services was charged with safeguarding the health and welfare for the infants; and

- The Charleston County Substance Abuse Commission was responsible for providing services for treatment of drug abuse.

Every person involved in that task force had one overriding objective – to develop an effective policy that would maximize maternal-fetal health and protect the children: "This was not supposed to be a punitive policy where we went out and punished people for doing something, even though we knew the activity was illegal. What we were trying to do is give those babies a chance to be born normal." [J.A. 506, lines 19-22]

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[2] Under South Carolina law, a viable fetus is a "child" under the abuse statutes and ingestion of cocaine during the third trimester of pregnancy constitutes criminal child neglect. *Whitner v. State of South Carolina*, 328 S.C. 1, 492 S.E.2d 777 (1995), *cert. denied*, 523 U.S. 1145 (1998). In addition, both agencies are designated to receive reports of suspected child abuse or neglect. S.C. Code Ann. § 20-5-510 (Law. Co-op. 1976 & Supp.) ("Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.")

Since the voluntary referral protocol had proven ineffective, the substance abuse representative on the task force proposed the "carrot and stick" method of coercive treatment as a last resort in dealing with the problem. He explained that most addicts are in such a state of denial that they will not voluntarily seek help unless there is some leverage to get their attention. [J.A. 738-40]

The Policy ultimately established provided a three-step process for identifying and dealing with pregnant patients that were using cocaine. The first two steps paralleled the prior protocol, but the addition of a third step – threat of law enforcement intervention – provided the necessary "leverage" to make the Policy effective.

IV. The Policy for Management of Drug Abuse During Pregnancy

The first step in the implementation of the Policy was the identification of pregnant patients suspected of drug abuse. The Policy contained a list of medical symptoms and indicia of drug abuse to identify which patients were to be screened by urine testing, to wit: 1. No prenatal care; 2. Late prenatal care after 24 weeks gestation; 3. Incomplete prenatal care; 4. Abruptio placentae; 5. Intrauterine fetal death; 6. Preterm labor of "no obvious cause"; 7. IUGR of "no obvious cause"; 8. Previously known drug or alcohol abuse; or 9. Unexplained congenital anomalies.[3] [App. 53-54.]

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[3] This list was not "medically senseless" as the Petitioners contend. Rather, the list was compiled by the Medical Center physicians from the medical literature available at the time, including articles written by one of the Petitioners' own expert witnesses, Dr. Ira Chasnoff. [J.A. 155, 286, 302, 313] Nor was the list targeted to discriminate against African-American pregnant women, to the contrary, the list was developed to remove any discretion for testing. [J.A. 847]

Like all MUSC patients, the maternity patients signed consent forms permitting the medical staff to conduct necessary testing – including urine tests.[4] In addition, all maternity patients were provided with educational information about the harmful effects of prenatal drug abuse and each patient also signed a statement acknowledging that she had received counseling.

If a patient tested positive, the second step included providing the patient with the same educational information and referring her to substance abuse counseling. If the patient failed to follow-up with substance abuse treatment or prenatal medical visits, or if she tested positive a second time, the Solicitor's office was notified and arrests were made.[5] This new third step proved to be the pivotal factor in making this an effective policy.

V. The Effectiveness of the Policy

Contrary to the Petitioners' broad assertions, the record establishes that the Policy was highly effective in educating women of the dangers and in discouraging cocaine use during their pregnancies.[6] After implementation of the

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[4] See forms, Opp. App. 60-65. The Petitioners claim that they did not give consent for their urine to be tested for drugs. The jury, however, found that they did consent. See discussion, infra.

[5] During a short period of time when the Policy was first initiated, a positive test was immediately reported and the patient was arrested. In early 1990, the Policy was amended to provide the patients a chance to obtain substance abuse treatment and avoid arrest. Even after arrest, the patient could avoid prosecution by completing a drug treatment program.

[6] The Policy has been discontinued since this litigation was initiated.

Policy, the medical staff experienced a decline in the number of positive drug screens and fewer medical complications previously attributed to cocaine abuse. [J.A. 681; Opp. App. 67-68] The substance abuse counselors reported that many of the patients referred by MUSC benefited from and successfully completed the treatment. [J.A. 64] Even many of the Petitioners themselves admitted that the Policy helped them successfully complete treatment and fight their addictions.

Of the 253 patients who tested positive during the relevant time period, only thirty failed to complete treatment or tested positive a second time and consequently, were arrested. Of those thirty, most were processed through pretrial intervention upon voluntary completion of substance abuse treatment. Only two – neither of whom is a Petitioner – failed to complete treatment and were prosecuted, but even they were ordered to complete treatment as a condition of probation rather than sentenced to an active jail term. [J.A. 1125-26]

Contrary to the Petitioners' supposition, there was no evidence that the Policy discouraged pregnant women from seeking treatment at the Medical Center. The MUSC data did not demonstrate any change in the utilization patterns of their prenatal clinics nor did they identify any increase in unbooked deliveries at other regional hospitals. [Opp. App. 67]

VI. Procedural History

The District Court submitted the Fourth Amendment claim to the jury on the question of whether the Petitioners consented to the urine drug tests, and judgment was entered for the Respondents on the jury's finding that the Petitioners

had consented to the searches. On appeal, the Court of Appeals found that the searches were reasonable under the special needs doctrine and affirmed the judgment for the Respondents on that ground without reaching the issue of the sufficiency of the evidence to support the jury's finding of consent to the urine tests.

In addition to the Fourth Amendment claim, the Petitioners asserted a number of federal and state law claims, each of which was properly rejected by the District Court, the trial jury, and the Court of Appeals. None of these additional claims have been preserved in this appeal.

The Petitioners asserted a constitutional challenge to the disclosure of medical information to law enforcement personnel as a violation of their Fourteenth Amendment right to privacy and a statutory claim for racial discrimination in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d - 2000d-6. The Petitioners also asserted a state-law tort claim against the MUSC medical staff for abuse of process.

The District Court granted judgment as a matter to law to the Respondents on the claims of abuse of process and right to privacy, and the Court of Appeals affirmed those rulings.

The jury found that the Respondents had not intentionally discriminated against the Petitioners based on their race, and the District Court ruled for the Respondents on the Title VI disparate impact claim. The Petitioners did not appeal the jury's finding of no intentional racial discrimination, and the Court of Appeals affirmed the disparate impact ruling.

VII. Clarification of the Question Presented

In light of the extraneous arguments and issues raised by the Petitioners and the petitioning *Amici Curiae*, Respondents feel it necessary at the outset to clarify what is and is not involved in this case.

The question presented is whether the urine drug screens conducted by the MUSC Medical Center were reasonable searches in compliance with Fourth Amendment jurisprudence. The Petitioners specifically challenge the Court of Appeals' ruling that the urine drug screens were reasonable under the special needs doctrine.

The Respondents maintain that the urine drug screens are clearly sustainable under the special needs doctrine as enunciated in this Court's precedent. However, Respondents also insist that the urine drug screens were reasonable searches because -- as the jury found -- the Petitioners voluntarily provided the urine samples and consented to the testing.

At this stage, there is no issue regarding the alleged "Unauthorized Disclosure of Medical Information" or breach of confidentiality by the medical staff. In the first instance, the Petitioners never asserted state common law claims for breach of physician-patient confidentiality.

While South Carolina courts have recognized an ethical duty of confidentiality and a correspondingly tort action for its breach, that duty is not absolute and disclosures compelled by law, such as those made by the MUSC Medical Staff are not actionable:

> [A]n actionable tort lies for a physician's breach of the duty to maintain the confidences of his or her patient **in the absence of a compelling public interest or other justification for the disclosure**." (Emphasis added).
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> ****
>
> Patients have the right to be candid in their disclosures of private information to their physicians without fearing this information will be disseminated throughout the community. **However, this right is not absolute and must give way when disclosure is compelled by law or is in the best interest of the patient or others.** (Emphasis added.)

McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 439 (Ct. App. 1997); *see also S.C. State Board of Medical Examiners v. Hedgepath*, 325 S.C. 166, 480 S.E.2d 724, 726 (1997) ("A physician acts ethically when she maintains patient confidences, and when she provides confidential information to others as required by law or as authorized by the patient."); *see also* S.C. Code Ann. § 20-5-510 (Law. Co-op. 1976 & Supp.) (mandatory reporting of suspected child abuse and neglect).

Secondly, the District Court rejected the Petitioners' Fourteenth Amendment claim of violation of their right to privacy by unauthorized disclosure of medical information. On appeal, that ruling was affirmed by the Court of Appeals, citing *Whalen v. Roe*, 429 U.S. 589, 602 (1977), wherein this Court recognized that such statutes requiring disclosure of otherwise confidential medical information to state officials does not automatically amount to an impermissible invasion of privacy. The Petitioners did not seek review of that

ruling in its Petition for a Writ of Certiorari and the issue is not before the Court.

Likewise, the Petitioners did not appeal the jury's finding that the Respondents did not intentionally discriminate against them based on their race. Nor did the Petitioners seek review of the Court of Appeals' affirmance of the District Court's rejection of their disparate impact claims. Yet, the Petitioners' brief contains numerous affecting references to racial animus. Under these circumstances, their continued insinuations of racial discrimination are a blatant attempt to invoke the Court's ire or appeal to its sympathy.

The Petitioners also attempt to influence the Court by painting a grim picture of the Petitioners' arrests and conditions of pretrial detention. However, there is no issue on appeal regarding the circumstances of their arrests or of their confinements. And, the evidence presented at trial rebutted the Petitioners' allegations and demonstrated that the arrests were properly conducted under standard protocol and the conditions of confinement were not inhumane nor were their jailers deliberately indifferent to their medical needs. The Petitioners also complain about the grounds for arrest, but this case does not present any question regarding the constitutionality of the statutes under which they were arrested.[7]

The sole question is whether the urine drug screens were reasonable. And, based on the facts and law, the answer is

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[7] In this same vein, several of the *Amici Curiae* attack the imposition of criminal sanctions for maternal drug abuse. However, this case is not the appropriate venue for these groups to lobby their political and social policy agenda against criminalization of drug abuse by pregnant women.

yes. They were reasonable both under the special needs doctrine and as consensual searches.

SUMMARY OF ARGUMENT

The Basic Tenet of the Fourth Amendment -- Reasonableness

The Fourth Amendment prohibits ***unreasonable*** searches, but it does not require that all government searches be conducted pursuant to a warrant supported by probable cause.[8] In *New Jersey v. T.L.O,* this Court declared that the

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[8] The Fourth Amendment only imposes strictures on government action. The Respondents have maintained throughout the litigation that the Medical Center and its staff were not state actors in conducting clinically necessary drug screens. No case has extended the application of the Fourth Amendment to medical personnel in a public hospital based solely on their status as government employees. However, to the contrary, the Court of Appeals for the Ninth Circuit has ruled that not all healthcare providers in public hospitals are acting as agents of the police subject to the Fourth Amendment in obtaining and testing bodily fluids in every case. *United States v. Attson*, 900 F.2d 1427, 1434 (9th Cir.), *cert. denied*, 498 U.S. 961 (1990).

The Fourth Amendment only applies if law enforcement instigated, encouraged or participated in the "search" and the healthcare provider engaged in the search with the intent of assisting the police in their investigative efforts. If there is a "dual purpose" – both medical and investigative – the search retains its private character, and if the search is "private" at the inception, subsequent voluntary disclosure to the police does not implicate the Fourth Amendment.

Here, the medical purpose was undeniably a legitimate, independent motivation for performing the urine drug screens. Thus, at worst, there was arguably a "dual purpose." In this situation, the Fourth Amendment simply does not apply to the conduct of the MUSC Medical Center and its staff.

"[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search ... in certain limited circumstances neither is required.'" 469 U.S. 325, 340 (1985) (quoting *Almeida Sanchez v. United States*, 413 U.S. 266, 277 (1973)).

The Court stressed that the touchstone[9] of Fourth Amendment analysis is reasonableness and "what is reasonable depends on the context within which a search takes place:"

> The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

Id. at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)).

The special needs doctrine comprises one such category of governmental searches which are reasonable notwithstanding the lack of a warrant or probable cause. Likewise, a search is reasonable if conducted pursuant to consent.

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[9] *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("the touchstone of the Fourth Amendment is reasonableness"; *see also Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.")

The Special Needs Doctrine

This Court has recognized that in certain cases, the government may have "special needs," beyond normal law enforcement goals, which make the usual warrant and probable-cause requirement impracticable

The special needs doctrine applies where there is an important or compelling special need founded on a concrete danger. Ultimately, the reasonableness of the search must be evaluated by balancing the public interest and the effectiveness of the search in advancing that interest against the individual privacy expectations and the degree of intrusion suffered by the individuals.

In upholding the MUSC Policy, the Court of Appeals correctly applied the principles and adhered to the parameters set by this Court. The evidence demonstrates that the drug screens were medically necessary for the treatment of the maternity patients and their children and that the epidemic of cocaine use by pregnant women and the attendant public health problems created important special needs beyond normal law enforcement goals. The evidence also establishes that the MUSC urine testing policy was effective in addressing these special needs and that the intrusion on the Petitioners' privacy expectations was minimal. Therefore, the Court of Appeals properly found that the searches were reasonable and judgment should be affirmed on that ground alone.

Consensual Searches

It is well settled that "a search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). A valid consent is one freely and voluntarily given. *Id.* This is a question of fact to be determined from the totality of all the circumstances. *Id.* at 227. There is ample evidence to support the jury's finding that the Petitioners freely and voluntarily provided the urine samples and consented to the drug screens. Therefore, the judgment should be affirmed on this alternate ground.

ARGUMENT

I. The urine drug screens were reasonable under the special needs doctrine.

A. The Special Needs Doctrine as Defined and Applied by the Supreme Court

The genesis of the special needs doctrine is found in the decision of *New Jersey v. T.L.O.*, in which the Court addressed the proper standard for assessing the legality of searches conducted by public school officials. In that case, a school principal discovered marijuana and other paraphernalia while searching a student's purse for cigarettes. When the principal turned the evidence over to the police and the state brought delinquency proceedings, the student moved to suppress the evidence, contending that the principal had violated her Fourth Amendment rights.

In upholding the search, the Court found that the warrant requirement was unsuited to the school environment and

concluded that the school officials did not need to obtain a warrant before searching students under their authority. The Court also concluded that the school officials did not need probable cause to believe a violation of law has occurred; but rather, that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. 469 U.S. at 341.

Justice Blackman concurred in the judgment of the Court, but wrote separately to emphasize the predicate justification for a warrantless search without probable cause: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351.

The Court adopted Justice Blackman's special needs analysis in *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), in holding that a state's operation of a probation system constitutes "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." [10] Pertinent to the Court's analysis was the fact that the probation officer who conducted the search was not a law enforcement officer; but rather, a government employee charged with supervising his client with the goal of assuring that the probation served as a period of genuine rehabilitation.

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[10] The Petitioners attempt to categorize this case and the other probation/parole cases separately from "special needs" cases on the grounds that probationers/parolees have lesser liberty rights. However, a fair reading of the Court's opinion shows that the decision was based squarely on the special needs doctrine.

The Court further refined the special needs doctrine in the companion cases of *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), which presented two different drug test policies for review under the special needs doctrine.

At issue in *Skinner* were railroad company policies that required blood, breath and urine testing of its employees under certain circumstances as mandated or permitted by regulations of the Federal Railroad Administration.[11] The Court found that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, ... 'likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. at 873-74).

In *Von Raab*, the Court upheld a policy of the United States Customs Service requiring a urinalysis test from all employee applicants for transfer or promotions to certain positions. In so holding, the Court succinctly articulated the following two-step analysis for application of the special needs doctrine: "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 489 U.S. at 665-66.

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[11] The regulations had been promulgated after the FRA gathered and evaluated evidence that on-the-job intoxication was a significant problem in the railroad industry and that alcohol and drug abuse by railroad employees posed a serious threat to safety.

In applying the special needs test, the Court found that the warrant requirement is as unsuited to the employment situation as it is to the school environment at issue in the *New Jersey v. T.L.O.* case and that imposing a warrant requirement "would only serve to divert valuable agency resources from the Service's primary mission." *Von Raab*, 489 U.S. at 666-67. The Court further found that "a warrant would provide little or nothing in the way of additional protection of personal privacy," *id.* at 667, because the circumstances under which the testing would be conducted and the permissible limits of the search were narrowly defined and the employees were well aware of the policy and its procedures. The Court also found that the compelling governmental interests justified the urine testing even in the absence of probable cause or any individualized suspicions of drug use.

In evaluating the public interest component of the balancing test, the Court noted that the smuggling of illicit narcotics has created a national crisis, and that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668. In light of such, the Court found that the Government has "a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. On the other side of the balancing scale, the Court found that the Customs employees "have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test." *Id.* at 672.

The Court ultimately held that the warrantless and suspicionless testing policy was reasonable because the Government's "compelling interest in safeguarding our

borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm." *Id.* at 677.

The Court revisited the application of the special needs doctrine to a drug testing policy in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). After observing a sharp increase in drug use among the student population and that athletes were the leaders of the school drug culture, the school district adopted a Student Athlete Drug Policy that authorized random drug testing of students who participated in school athletic programs. The express purpose of the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." *Id.* at 650.

Relying on its previous decision in *New Jersey v. T.L.O.*, the Court again found that special needs exist in the public school context which make the warrant and probable-cause requirement impracticable. *Id.* at 653. Turning then to the evaluation of the privacy interests, the Court found that the students' legitimate expectations of privacy were diminished because of the supervisory role of the school and the voluntary participation in extracurricular athletic activities. On the other side of the equation, the Court found that, with the clear evidence of an immediate crisis of great proportions,[12] deterring drug use by schoolchildren is an important governmental concern and it was "self-evident"

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[12] The District Court had found that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion;" "[d]isciplinary actions had reached epidemic proportions;" and "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F.Supp. 1354, 1357 (Ore. 1992).

the problem was effectively addressed by preventing drug use by student athletes. Taking all these factors into consideration, the Court concluded that the policy was reasonable.

The only case in which the Supreme Court has struck down a drug testing policy under the special needs analysis is *Chandler v. Miller*, 520 U.S. 305 (1997). At issue there was a Georgia statute which required that all candidates for certain state offices submit to a urinalysis for illegal drug use and test negative as a precondition to qualifying for a place on the ballot.

In addressing the espoused justification of the statute under the special needs doctrine, the Court reviewed and summarized its decisions in *Skinner*, *Von Raab*, and *Vernonia*: "Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[13] *Id.* at 318. The Court found that the State of Georgia had failed to demonstrate any such special need. The key to the Court's decision appears to be a lack of evidence of a concrete danger that state officeholders in

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[13] All of the special needs cases involved warrantless searches, but they also involved a range of levels of suspicion. The policies in *Von Raab, Vernonia,* and *Chandler* all called for drug testing without any level of individualized suspicion. In contrast, the policy is *Skinner* was based on specific factors that provided the basis for some level of individualized suspicion. Likewise, in *New Jersey v. T.L.O.*, the search was predicated on individualized suspicion. The searches in this case were not suspicionless. The criteria for performing the test was medically-based, and provided ample suspicion to believe that the patients had been using cocaine.

Georgia have drug problems; rather, Georgia merely presented a "symbolic" need to project its commitment to the fight against drugs.

The urine drug screens conducted under the MUSC Policy meet the guiding principles and parameters of the special needs doctrine as enunciated by the Court in these cases. The important – if not compelling – special needs to treat and protect the maternity patients and their children were well documented. The Respondents also presented evidence that the Policy was effective and only minimally intrusive. Accordingly, judgment for the Respondents should be affirmed.

B. There were well-documented special needs to treat and protect pregnant patients and their children.

The first step in the special needs analysis is the determination of whether the search serves a special governmental need beyond normal law enforcement needs. Contrary to the Petitioners' assertions, the Policy was not merely a symbolic opposition to drug use as in *Chandler*. Rather, the MUSC Medical Center demonstrated well-documented special needs in treating and preventing cocaine use by pregnant women.

The incontrovertible evidence is that both the obstetrical and neonatal medical staff had a clinically-based need for the information in order to manage the pregnancy and treat the newborns.[14] The evidence also demonstrated that medical

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[14] See also Brief of *Amici Curiae* American Public Health Association, et al., pages 19-20, acknowledging clinical need to know of cocaine use for safe administration of anesthesia.

communities in the City of Charleston, other areas of the State of South Carolina, and across this Nation were experiencing serious maternal and neonatal health problems as a result of the epidemic of prenatal drug abuse.

The Petitioners, and several *Amici Curiae*, attempt to deny the existence of the problem and/or minimize its impact. However, the Petitioners' own expert, Dr. Ira Chasnoff,[15] testified before Congress in 1989 that there had been a rapid rise in reported instances of cocaine use during pregnancy and something needed to be done immediately about the problem. [J.A. 313-14]

Since the "special need" was uniquely medical in nature, it was appropriately addressed on the frontline by medical personnel that could best identify the at-risk patients and most effectively implement a policy to prevent or treat prenatal drug abuse. Notably, Dr. Chasnoff testified that it was "essential for medical professionals to develop protocols and criteria to test pregnant women for cocaine use during pregnancy." [J.A. 314, lines 5-8]

The words of Justice Powell in his concurrence in *New Jersey v. T.L.O.*, illustrate how special relationships -- such as that between healthcare providers and their patients -- can establish a basis for recognizing special needs exceptions to the warrant/probable cause requirement:

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and

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[15] Despite his status as a witness in the case, Dr. Chasnoff has sought leave to appear as *amicus curiae* along with the American Public Health Association.

> arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

469 U.S. at 349. The Court in *Griffin v. Wisconsin* also found it pertinent that the primary role of a probation officer was not to investigate criminal activity, but to supervise his client with the goal of assuring that the probation served as a period of genuine rehabilitation.

By the same token, healthcare providers and patients do not stand in an adversarial relationship to each other. Instead, there is a commonality of interests between medical personnel and their patients. In maternity cases, the medical personnel and the patients share common interests in the health of both the mother and her child.

The medical staff did not conduct the drug screens for the purpose of investigating criminal activity. The purpose was to provide proper medical treatment to their patients. During pregnancy, so many factors effect the health of the mother, the course of the labor and delivery, and the health of the child, that the medical staff cannot adequately treat the pregnant patient or manage the pregnancy without such critical information as the patient's use of illegal drugs.

The opinion of the Court of Appeals cannot fairly be read, as the Petitioners assert, to establish any dangerous precedent that would permit law enforcement to engage in warrantless searches for just any and every health or safety reason. The

Court of Appeals adhered to this Court's decisions in *Vernonia* and *Chandler*, in stressing that the governmental need must be "compelling" and that "the hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one." 186 F.3d at 477. The Court of Appeals correctly found that: "In light of the documented health hazards of maternal cocaine use and the resulting drain on public resources, MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women." 186 F.3d at 478.

The Court has recognized in *Von Raab* that "drug abuse is one of the most serious problems confronting our society today." 489 U.S. at 674. However, the Court has drawn parameters for how far that problem will justify warrantless searches. In *Vernonia,* the special need for the school's random drug testing policy was justified by documented evidence of a sharp rise in drug use by student athletes and attendant injuries and disciplinary problems. On the other hand, in *Chandler v. Miller*, the State of Georgia could not produce any evidence of drug problems among state officeholders to establish a special need sufficient to justify its mandatory drug testing for political candidates.

The Court of Appeals decision is not a radical departure from the parameters set by the Court. To the contrary, it squarely fits within those parameters as a clear case of "special needs" sufficient to sustain the MUSC Policy. In comparing the range of documentation and substantiation of the special needs, this case clearly aligns most closely with *Vernonia* where the school district presented solid evidence to document the existence and extent of the problem of drug abuse by its students and the harmful consequences to school discipline and the students' health. Unlike in *Chandler*, the special need to protect pregnant women and their children

from prenatal cocaine abuse is not merely symbolic, but fully demonstrated by the evidence of an epidemic causing serious public health problems.

The Petitioners complain about the collaboration with law enforcement and argue that any special needs search must be totally divorced from any law enforcement activity. However, this argument directly conflicts with the Court's repeated references to "'special needs' **beyond normal law enforcement**." *Griffin v. Wisconsin*, 483 U.S. at 873-74 (emphasis added.)

Notwithstanding that the references to the restricted use of the drug test results in *Von Rabb, Skinner,* and *Acton*, the Court has never said that the results of a special needs search cannot be turned over to law enforcement. Notably, in the case of *New Jersey v. T.L.O.* which came before the Court on appeal of the juvenile criminal case, the Court found no reason to invalidate the search because the fruits were ultimately turned over to the police.

Here, the MUSC Medical Center had a primary, clinical need to identify cocaine use which was wholly beyond normal law enforcement goals. However, under state law, prenatal illegal drug use constitutes child abuse. Thus, once in possession of evidence of cocaine use, state law mandated that the MUSC medical staff report such cases to law enforcement or the Department of Social Services. Nothing in the prior decisions of this Court intimates that disclosure of such information under mandatory reporting statutes would invalidate an otherwise legitimate special needs search.

Further, this case does not present any evidence, direct or inferential, that the MUSC Medical Center's goal of

protecting the health of its maternity patients and their children was merely a pretext to prosecute cocaine addicts. The record establishes that there was a very real medical epidemic and the Medical Center's only goal was to manage the pregnancies of its maternity patients and prevent maternal and infant injuries arising from prenatal cocaine abuse.[16] The Medical Center had already attempted a protocol that proved ineffective and it was the substance abuse counselors that proposed the coercive element necessary to make the Policy work. The purpose of the urine drug tests was not to prosecute the drug laws; rather, the threat of prosecution was but a tool in implementing a Policy that would prove to be effective in discouraging their patients from prenatal cocaine abuse.

C. The Policy was Effective.

The second step is an assessment of the effectiveness of the policy in meeting the identified, important special needs. As the Court of Appeals found, the urine drug screens were effective in identifying cocaine use which met the clinical needs.[17] In addition, a decline in the number of positive drug screens and fewer associated medical complications demonstrated that the Policy effectively met the broader need to discourage prenatal cocaine use.

Evidence established that the Policy had a ninety percent success rate: 223 of the 253 pregnant women who tested positive the first time, completed substance abuse treatment

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[16] See J.A. 34, 68, 71, 452, 598, 929, 974, 1084.

[17] The Court of Appeals found "little doubt that testing the urine of maternity patients when certain indicia of possible cocaine use were present was an effective way to identify and treat maternal cocaine use...." 186 F.3d at 478.

and did not test positive a second time. Of the thirty who did test positive a second time and were arrested, twenty-eight successfully completed substance abuse treatment through the pretrial intervention program. Most telling is the testimony of many of these Petitioners that they had finally beaten their cocaine habits. [J.A. 582 Griffin, 787 Knight, 1037 Powell, 479 Ferguson, 595 Hale, 745-46 Joseph, 971 Pear].

Despite this evidence, the Petitioners claim that the Policy was ineffective in promoting fetal health because of what they allege as its "faulty design" in focusing only on cocaine use and by employing a punitive approach to treatment.

The Petitioners assert that the Policy was "medically senseless" because it did not address other drugs that also pose risks of harm to the infant. Such assertion is disingenuous in light of the fact that their own expert testified that at the time, cocaine use had been identified as a particularly critical problem – both in terms of its epidemic scope and devastating consequences.[18] Similarly, their contention that the punitive approach drives women away from prenatal care and treatment program disregards the record evidence to the contrary.

Further, the Respondents' decision to focus on cocaine use was a rational discretionary policy decision not subject to second-guessing. This Court has recognized that policy-makers are not constitutionally obligated to tackle complex

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[18] The record evidence stands in stark contrast to the assertions of certain *Amici Curiae* that subsequent studies contain no empirical data of a unique danger associated with prenatal cocaine use. [Brief of American Public Health Association, p. 27.] Further, the MUSC medical staff's decisions must be evaluated in light of the then available evidence, including the expert opinions of those such as Dr. Chasnoff.

problems with full-scope, comprehensive programs. *Bowen v. Owens*, 476 U.S. 340, 347 (1986). Rather, they may take a step-by-step approach and address that phase of the problem which they adjudge most acute at the time. *Id.*; *see also Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies .... [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.")

Likewise, the decision to employ a punitive – "carrot and stick" -- approach to discouraging cocaine use was rationally based on consultation with substance abuse counselors. And, although the evidence rebuts the claim that this discouraged some pregnant women from seeking treatment, any such indirect impact does not invalidate the policy. *See Whalen v. Roe*, 429 U.S. 589, 602-603 (1977) (finding that while patients may avoid or postpone medical attention because of concerns about disclosure of information that might be ascertained during treatment, it did not render the policy unconstitutional).

There is rarely, if ever, a single perfect solution to a complex problem such as prenatal drug abuse. This Court has "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. at 597. This Court has also stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Oklahoma*, 348 U.S. at 487.

It is for the policymakers to balance the benefits and risks of proposed solutions, and their decisions are reviewable by the courts only for arbitrariness and capriciousness or invidious discrimination. Experts in a given field[19] may disagree over techniques to be employed to deal with a serious danger, but "for purposes of the Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials" – not the courts. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990).

The Policy was the product of an orderly and studied attempt to deal with a specific problem of epidemic proportions. There was nothing unreasonable or discriminatory in their identification of cocaine as a particularly critical problem or their decision to focus on that illegal drug to the exclusion of other illegal (or legal) substances which pose risks to maternal and fetal health.

D. The Intrusion was Minimal.

The next step in the special needs analysis is consideration of the nature of the Petitioners' privacy expectations and the level of intrusion. The Court of Appeals correctly held that

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[19] Accordingly, the prominence or number of those public interest groups, such as listed in the Brief of *Amicus* Curiae American Public Health Association, which are opposed to the use of the punitive approach does not conclusively establish that the Policy was ineffective. Here, the punitive approach was proffered by the local substance abuse counselors after voluntary treatment options proved ineffective and it did, in fact, prove to be effective at MUSC – regardless of what studies might have proven elsewhere.

testing the Petitioners' urine for cocaine was a minimal intrusion on their reduced privacy expectations.

First, the Petitioners voluntarily sought treatment at the MUSC Medical Center and they consented to the collection and testing of the urine.[20] Further, as this Court has noted, privacy concerns are minimal when the urine samples for testing are collected in a medical environment.

In *Skinner v. Railway Labor,* the Court noted that urine testing does not invade the body and when collected in a medical environment, the procedure is not a significant invasion of personal privacy. 489 U.S. at 626. Likewise, in *Chandler v. Miller,* the Court noted the minimal intrusion when the tests are conducted in physicians' offices. *Cf. Schmerber v. California*, 384 U.S. 757, 771 (1966) (holding that the intrusion occasioned by a blood test is not significant since such tests are routine medical procedures).

The Petitioners claim that they had a ***heightened*** expectation of privacy with respect to disclosure of their confidential medical information[21], citing the Hippocratic Oath and *Whalen v. Roe*, 429 U.S. 589, 599 (1977). However, as discussed above,[22] physician-patient confidentiality does not preclude disclosures compelled by law. Moreover, in *Whalen v. Roe*, the Court discussed the limitations on a patient's expectations of privacy of medical

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[20] See discussion of consent, infra.

[21] Notably, the Petitioners voluntarily consented to the disclosure of their medical information to other sources, thereby reducing their expectations of absolute confidentiality.

[22] See discussion of Clarification of Issues, supra.

information and specifically noted statutory reporting requirements relating to child abuse. 429 U.S. at 602 n.29.

E. The Special Needs Outweighed the Minimal Intrusion.

The final step is balancing all these factors. In *Skinner*, the Court balanced the limited discretion exercised by the employers in determining which employees could be tested under the railroad policies, the "surpassing" interests in train safety, and the diminished expectation of privacy held by railway employees that participate in such a heavy regulated industry. Similarly, in *Von Raab*, the Court balanced the government's compelling interest in preventing the promotion of drug users that might endanger the border security or public safety with the diminished expectation of privacy interests of the applicants for such security-sensitive positions. In *Vernonia*, the Court took into account the reduced expectation of privacy of school children, the relative insignificance of the intrusion, the important nature of the school's responsibilities and quasi-guardian relationship with its students, the documented immediacy of the drug problems; and the effectiveness of the policy.

Here, there is ample evidence of the clinical need to identify cocaine use and of the existence and magnitude of the epidemic of prenatal use of cocaine at that time. There is also sufficient evidence of the effectiveness of the urine testing in identifying and treating maternal cocaine use.

Finally, the degree of intrusion was minimal in light of the fact that the collection and testing of urine was a normal, routine and expected part of the medical treatment to which the Petitioners had consented and the urine tests were

performed based on a non-discretionary application of the criteria delineated in the Policy.[23]

The Court of Appeals properly evaluated these factors and correctly concluded that the special needs outweighed the minimal intrusion. That decision comports with this Court's precedent and is consistent with a number of the circuit court decisions upholding random and mandatory drug testing policies in a number of industries ranging from schools to nuclear power plants to horse racing. Those few decisions where the circuits have struck down drug testing policies are also consistent with this Court's precedent and distinguishable from the case here.[24]

The appropriate application of the special needs doctrine in this case perhaps is best illustrated by comparison of decisions arising out of child abuse and neglect investigations. *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993); and *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993).

In *Franz*, a police officer investigating a case of possible sexual abuse conducted a warrantless inspection of the child's vaginal area and forcibly removed the child for medical examination. The police officer argued that the "societal imperative to protect children" justified his actions under the special needs doctrine. While expressing a "deep concern for the safety and well-being of young children," the

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[23] The Petitioners argue that the Fourth Circuit improperly applied the balancing test enunciated in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). However, the Court itself relied upon *Sitz* in its opinion in *Vernonia School District v. Acton*, 515 U.S. at 654.

[24] See discussion in Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, pages 23-25.

court rejected the special needs argument because the primary focus of the police officer's investigation was the potential criminal culpability of the parents:

> What the district court perceived, and what cannot be overlooked, is that defendant's focus was not so much on the child as it was on the potential criminal culpability of her parents. That focus is the hallmark of a criminal investigation. In contrast, a social worker's principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker's activity, that prospect is not part of the social worker's cachet.

997 F.2d at 791; *see also Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (possibility of criminal prosecution was contingency of only secondary importance to social worker).

In contrast, the Court of Appeals for the Fourth Circuit upheld a medical examination by a public health nurse that accompanied a social worker in the course of a child neglect investigation, finding that the state's interest in examining the neglected children outweighed any attenuated privacy interest.

These two cases illustrate two important distinguishing factors: (1) the official role of the person or entity conducting the search; and (2) the primary focus of the search. The urine drug screens in this case were conducted by medical personnel, not law enforcement officers, and the primary focus of the search was to manage the pregnancy and protect the health of both the mother and the infant. Similarly, a social worker's principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker's activity, that prospect is not part of the

social worker's cachet. Likewise, here, the principal focus of the MUSC medical staff was the welfare of the pregnant patient and her child, and while a criminal prosecution might emanate from the activity, that prospect is not part of the medical staff's "cachet."

One final consideration to be factored in the balancing is the impracticability of imposing, under such circumstances, a warrant requirement. Contrary to the Petitioners' contentions, it would be impracticable, if not impossible, to require the MUSC medical staff to seek a warrant for a urine drug test every time that a maternity patient presents with symptoms and indicia of cocaine use. As this Court recognized in *Skinner*, drugs are eliminated from the body at a constant rate, and samples must be obtained as soon as possible and the delay to procure a warrant might result in the destruction of valuable evidence. 489 U.S. at 623.

To paraphrase the Court's ultimate conclusion in *Skinner* -- in light of the limited discretion exercised by the medical staff under the Policy, the surpassing clinical needs and broader public health interest served by the urine drug tests for prenatal cocaine use, and the diminished expectation of privacy that attaches to urine samples voluntarily provided for routine medical treatment and the information gathered therefrom pertaining to illegal drug use and consequent child abuse, it is reasonable to conduct such tests in the absence of a warrant.

II. The Petitioners consented to the searches.

A valid consent does not have to be "knowing" and "intelligent" in the same sense as a valid confession.[25] *Schneckloth v. Bustamonte*, 412 U.S. at 241 ("Nothing either in the purposes behind the requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.") Rather, it only has to be freely and voluntarily given. Here, the drug screens were constitutionally valid because, as the jury found, the Petitioners freely and voluntarily consented to the urine testing.

First, unlike other special needs cases, the Petitioners were not compelled to provide urine samples. They freely and voluntarily sought medical treatment at MUSC and provided the urine samples as a routine part of that treatment.[26]

Second, each of the Petitioners signed a consent to treatment form which authorized the MUSC medical staff to conduct all necessary tests of those urine samples – including drug tests: "I further consent to the testing for drugs if deemed advisable by or necessary in the professional judgment of the physician or surgeon, or physician or

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[25] The District Court did, however, charge the jury that "before there can be consent, there must be knowledge. The person giving the consent must have knowledge of what she is doing." [J.A. 1318, lines 16-19]

[26] It is notable that apart from the positive urine drug screens, several of the Petitioners actually admitted to the medical staff that they were using cocaine during their pregnancies. [J.A. 456 (Ferguson), 591 (Hale), 753 (Joseph); 1212 (Williams)]

surgeon acting under their instructions." [App. 64; Joint Exhibit No. 13 – Consent for Treatment.[27] See also App. 62, Joint Exhibit No. 12 – "I further consent to the testing of drugs if deemed advisable by my physician."]

The District Court charged the jury that those written consents were "sufficient to cover the taking of the a urine sample and the testing thereof ..." [J.A. 1318, lines 1-2.] However, the District Court also charged the jury that the written consents were not sufficient to cover the sharing of that information with law enforcement officials. [J.A. 1318, 5-7.] Instead, the District Court charged, the Respondents were required to show that the Petitioners consented to MUSC disclosing the information to law enforcement.[28] [J.A. 1319, lines 16-22.]

There is no precedent in this Court's Fourth Amendment search and seizure jurisprudence which imposes any such requirement that the searching agency inform the consenting party that the results of the search will be turned over to law enforcement. In fact, this Court's opinions would indicate the contrary.

In *Schneckloth v. Bustamonte,* the Court held that a valid consent does not depend on knowledge of the right to refuse consent, although it may be one of the factors to be considered along with all the other circumstances. 412 U.S. at 222, 248-49 ("Voluntariness is a question of fact to be determined from all the circumstances, and while the

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[27] See Defendants' Exhibits 1 – Williams, 1A – Ferguson, 13A – Griffin, 51A – Knight, 67A – Nicholson, 81B – Pear, 95A – Powell, 155 – Singleton, 174 – Hale, and 175 – Joseph.

[28] The Petitioners also consented to disclosure of their medical information to certain sources.

subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."). And, more recently, in *Ohio v. Robinette*, 519 U.S. 33, 40 (1996), the Court rejected a per se rule that would "require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."

Notwithstanding the District Court's questionable charge, the evidence presented to the jury supports the finding that these Petitioners did freely and voluntarily consent to the urine drug screens with sufficient knowledge that any positive results of those tests could be turned over to law enforcement officials.

Under the Policy all patients were given a letter at the time of their initial visit which explained the urine drug testing policy and which would clearly put them on notice that law enforcement would be contacted if they tested positive and did not get treatment. [App. 54, 56-57; J.A. 165, 174, 1269]

Some of the Petitioners admitted seeing or hearing the public service announcements about the Policy which would have put them on notice that their urine would be tested for cocaine and positive test results would be disclosed to law enforcement. [J.A. 345, 477-78, 753] And, in fact, several of the Petitioners admitted that they were aware of the Policy at the time they sought treatment at MUSC and provided urine specimens for testing. [J.A. 478, 754-5, 969-70]

The jury's factual finding that the Petitioners consented to the drug testing is fully supported by the evidence adduced during the six-week trial and stands as an independent

ground for sustaining the judgment that there was no Fourth Amendment violation.

CONCLUSION

For all the foregoing reasons, the urine drug tests were not unreasonable searches violative of the Fourth Amendment. The Fourth Amendment does not apply to urine drug tests conducted for medical reasons, but, in any event, they were reasonable under either the special needs analysis applied by the Court of Appeals or the jury's factual finding that the Petitioners consented to the tests. Accordingly, judgment for the Respondents should be affirmed.

Respectfully submitted,

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